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In the

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 374

BEN HERBERT PHELPER,

*Petitioner,*

*v.*

BILL DECKER, SHERIFF OF DALLAS COUNTY, TEXAS,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## INDEX


| | Page |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statutes Involved | 2 |
| Statement | 2 |
| Reason For Granting The Writ | 4 |
| Conclusion | 7 |
| Appendix A—Opinion | 9 |
| Appendix B—Statute | 11 |
| Appendix C—Statute | 13 |
| Appendix D—Opinion | 15 |

Page

Harris v. Ellis, 204 F. 2d 685, 686 (5th Cir. 1953) ..... 4

Jackson v. Denno, 378 U.S. 368 ..... 6

Jacobellis v. Ohio, 378 U.S. 184 ..... 6

Kahm v. United States, 300 F. 2d 78 (5th Cir.) Cert. denied, 369 U.S. 859 (1962) ..... 5

Ker v. California, 374 U.S. 23 ..... 6

United States v. Davis, 353 F. 2d 614 (2nd Cir. 1966) ..... 5

United States v. Klaw, 350 F. 2d 155 (2nd Cir. 1965) ..... 5

Wong Sun v. United States, 371 U.S. 471 ..... 6

**Statutes**

Texas Penal Code, Article 527 ..... 2

28 U.S.C., Section 1254(1) ..... 2

28 U.S.C., Section 2253 ..... 3

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on May 5, 1966, denying Petitioner's Motion for a Certificate of Probable Cause.

## OPINION BELOW

The memorandum opinion of the Court below is unreported and is printed in Appendix A hereto. As reflected by such opinion, on Motion for Reconsideration and for Stay of the Mandate, such Appellate Court stayed its Order for ninety (90) days from and after May 5, 1966, to

allow the filing of a Petition for Writ of Certiorari in the Supreme Court of the United States.

## JURISDICTION

The jurisdiction of this Court to review the case on Petition for Writ of Certiorari rests upon 28 U.S.C., Section 1254(1).

## QUESTIONS PRESENTED

Whether or not a Certificate of Probable Cause should be granted in Miscellaneous Number 435, styled Ben Herbert Phelper, Petitioner, v. Bill Decker, Sheriff of Dallas County, Texas, Respondent.

## STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C., Section 2253, which statute is printed in Appendix B, and Article 527 of the Penal Code of Texas, which Article is printed in Appendix C.

## STATEMENT

Petitioner was convicted on July 29, 1964, under Article 527 of the Texas Penal Code for unlawfully and knowingly having in his possession obscene pictures, his punishment being assessed at a fine of One Thousand Dollars ($1,000.00). This conviction was affirmed by the Court of Criminal Appeals of Texas by written opinion on March 10, 1965, Motion For Rehearing being denied on April 14, 1965, without written opinion. On April 22, 1965, Petitioner presented an Application for Writ of Habeas Corpus to

the Texas Appellate Court, the same being denied on such date without written opinion. Thereafter, Phelper filed his Petition for Writ of Certiorari in this Supreme Court of the United States, Cause No. 407, October Term, 1965, styled Ben Herbert Phelper, Petitioner, v. State of Texas, Respondent. As to such Petition upon the merits of his cause, the same was denied on December 6, 1965, Mr. Justice Black and Mr. Justice Douglas being of the opinion that Certiorari should be granted. Thereafter, on December 28, 1965, Phelper filed and presented his Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Texas, at Dallas, Texas, in Cause Number Civil 3-1332, styled Ben Herbert Phelper, Petitioner, v. Bill Decker, Sheriff of Dallas County, Texas, Respondent. After denial of his Petition by the Federal District Judge, Phelper gave notice of appeal and was granted bail pending such appeal, but the District Judge refused to issue a Certificate of Probable Cause requisite to the perfection of appeal. Thereafter, on March 29, 1966, Phelper made application to the United States Court of Appeals for the Fifth Circuit for a Certificate of Probable Cause under the authority of 28 U.S.C., Section 2253. That Appellant Court, acting through a panel of three (3) Judges, denied Phelper's Application for a Certificate of Probable Cause by its Order dated May 5, 1966, but upon Motion for Reconsideration and for a Stay, that Court by subsequent Order dated June 6, 1966 (Appendix A), granted a Stay as to its Order denying a Certificate of Probable Cause to allow the filing of this Petition for Writ of Certiorari. Phelper's former Petition for Writ of Certiorari on the

merits in this Court in Cause No. 407, October Term, 1965, as well as the Record and the State's Response, is incorporated herein by reference for all pertinent purposes.

The evidence developed at the trial of this cause in the State Court is summarized in the opinion by the Texas Court of Criminal Appeals appearing as Appendix D herein.

## REASON FOR GRANTING THE WRIT

**The decision of the Appellate Court denying Certificate of Probable Cause is erroneous in that Petitioner has made a substantial showing of the denial of his Federal constitutional rights under the Fourteenth Amendment to the Constitution of the United States.**

The decision of the Appellate Court denying Certificate of Probable Cause appears to conflict with its own prior position, i.e., that such Certificate should be denied where a Petition "made no substantial showing of the denial of any Federal right * * *." *Harris v. Ellis*, 304 F. 2d 685, 686 (5th Cir. 1953).

The issues presented to the Court below are as follows:

A. The State conviction was so lacking in evidentiary support as to constitute a violation of Phelper's due process rights under the Fourteenth Amendment to the Constitution of the United States. Phelper was convicted under Article 527 of the Texas Penal Code for unlawfully and knowingly having in his possession obscene photographs, his punishment being assessed at a fine of One Thousand Dollars ($1,000.00). In the State trial of this case, it is undisputed that no proof was adduced as to what constituted community standards. Respondent does take the

position that the Prosecutor sought to introduce evidence that the photographs were obscene, citing the State Record (S.F. 193-194, 203, 389, 1.6). The Record reflects that police officer witnesses were asked if they thought certain photographs were obscene; rather than any attempt to prove community standards. The Prosecutor further offered proof as to the identity of the persons in the photographs, to which Phelper objected, but not proof of standards.

The jury was permitted to, in effect, enact legislation ad hoc, with only the photographs themselves as a predicate, thereby impermissibly being allowed a broad freedom to speculate and suspect about the prurient appeal of material to some unknown person. Phelper's contention is that proof must be offered to demonstrate appeal to such interest to some class and that a photograph never "speaks" for itself, as stated by the Texas Court of Criminal Appeals in its review of this case. As to this, there appears to be a conflict between the various Circuits. The Second Circuit in *United States v. Klaw*, 350 F. 2d 155 (1965), appears in agreement with Phelper's position, whereas, the Fifth Circuit in *Kahm v. United States*, 300 F. 2d 78, Certiorari denied, 369 U.S. 859 (1962) is contra. See dissenting opinion, *United States v. Davis*, 353 F. 2d 614 (2nd Cir. 1966).

B. It is undisputed that the Trial Court failed to make an independent finding upon the issue as to whether or not Phelper voluntarily consented by a written consent to a search of his home in which the product was found from which his conviction was based. In contrast to the opinion

of the Texas Court of Criminal Appeals, it is Phelper's contention that the doctrine of *Jackson v. Denno*, 378 U.S. 368, is applicable in the premises. Without a determination as to the underlying factual issues and voluntariness of the consent, there is no way of determining under a general verdict of guilty by a jury whether the finding as to the consent was infected with impermissible considerations. The underlying considerations as to the voluntariness of a confession in *Denno* applies with equal force to the issues as to written consents to the search of one's home. The ultimate question in each instance being voluntariness with equal impermissible considerations flowing to the jury without the independent determination of the Trial Judge in advance thereof.

C. The arrest of Phelper for misdemeanor not committed in the presence of the arresting officer, being illegal under Texas law, Phelper contends under the doctrine of *Wong Sun v. United States*, 371 U.S. 471; *Mapp v. Ohio*, 367 U.S. 343; and *Ker v. California*, 374 U.S. 23, that his rights under the Fourteenth Amendment to the Constitution of the United States were violated by the admission of the fruits of a search based upon a written consent executed by him after illegal arrest and continued detention.

D. It is further undisputed that the State Trial Judge charged the jury that obscenity is to be determined by the contemporary community standards of the State of Texas, whereas, the standard is, and should be, a nationwide standard. *Jacobellis v. Ohio*, 378 U.S. 184.

## CONCLUSION

WHEREFORE, Petitioner prays that his Petition for Writ of Certiorari be granted, that the judgment and Order of the United States Court of Appeals for the Fifth Circuit be reversed, and that the issuance of a Certificate of Probable Cause be directed.

Respectfully submitted,

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## APPENDIX A

FILED
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Edward W. Wadsworth
*Clerk*

In the

# United States Court of Appeals

## FOR THE FIFTH CIRCUIT

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**Misc. No. 435**

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BEN HERBERT PHELPER,

*Petitioner,*

*v.*

BILL DECKER, SHERIFF OF DALLAS COUNTY, TEXAS,

*Respondent.*

---

*On Motion for Reconsideration and for Stay*

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Before TUTTLE, Chief Judge, and JONES and THORNBERRY, Circuit Judges

BY THE COURT:

IT IS ORDERED that the motion for reconsideration of this Court's order of May 5, 1966, denying the motion for a certificate of probable cause in the above case is hereby denied.

IT IS FURTHER ORDERED that this Court's order issued to the United States District Court for the Northern District of Texas at Dallas, Texas, be and it is hereby stayed for ninety days from and after May 5, 1966, to allow the filing of a petition for writ of certiorari in the Supreme Court of the United States.

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## APPENDIX B

### 28 U.S.C., Section 2253.

§ 2253. Appeal

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceedings where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause, June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949 c. 139, § 113, 63 Stat. 105; Oct. 31, 1951, c. 655; § 52, 65 Stat. 727.

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## APPENDIX C

*Texas Penal Code, Article 527*

Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statute, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.

Section 2. Whoever shall knowingly offer for sale, sell, give away, exhibit, televise, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, to a minor shall be fined not more than Two Thousand, Five Hundred Dollars ($2,500) nor imprisoned in the county jail more than two (2) years or both.

Section 3. For purposes of this article the word "obscene" is defined as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further, for the purpose of this article, the term "con-

temporary community standards" shall in no case involve a territory or geographic area less than the State of Texas.

Section 4. Whosoever shall be convicted for the second time of a violation of this article shall be deemed guilty of a felony and shall be punished by confinement in the State penitentiary for not more than five (5) years or by a fine of not more than Ten Thousand Dollars ($10,000) or by both such fine and imprisonment.

Section 5. It shall be a defense to any charges brought hereunder if such prohibited matter or act shall be regularly in use in any bona fide, religious, educational or scientific institution or the subject of a bona fide scientific investigation.

The provisions of this Act shall not apply to any motion pictures produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) legally move in interstate commerce under Federal Law; or (3) are legally imported from foreign countries into the United States and have been passed by a Customs Officer of the United States Government at any port of entry.

The provisions of this Act shall not apply to any daily or weekly newspaper.

Section 6. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application of any district or county attorney within their respective jurisdictions, to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this Act.

# APPENDIX D

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No. 37,771

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BEN HERBERT PHELPER, *Appellant,*

*v.*

THE STATE OF TEXAS, *Appellee.*

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*Appeal from Dallas County*

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## OPINION

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Appellant was convicted under Art. 527, V.A.P.C., for unlawfully and knowingly having in his possession obscene pictures, and his punishment was assessed at a fine of $1,000.

The State's evidence shows that appellant lived with his wife and step-son in the city of Richardson. In the early part of November, 1963, when the witness James Bartley was in the home delivering milk, appellant showed him some pictures of nude women. Subsequent to seeing the pictures, Bartley had a conversation with Detective Bob Smith of the Richardson Police Department. On November 7th, Detective Smith who had some experience in photography met with the appellant in a drug store, and the two became en-

gaged in a conversation relative to photography. In the conversation, appellant told the detective that he took pictures and requested him to come to appellant's home and see his photographs so that he could recommend a place where he might sell or distribute them. The following day, Detective Smith went to the home where appellant showed him between one and two hundred pictures which were colored slides of different girls. Of the pictures exhibited only one appeared to be obscene, it being a photograph of a woman with her pubic hair exposed. On such occasion, appellant emphasized that he was interested in selling the pictures and thought the detective could use some of his contacts in helping him sell them.

After leaving appellant's home, Detective Smith had a meeting with his Chief of Police, and Postal Inspector R. H. Robinson was later called. In a meeting on November 12th with the Inspector, a buyer for apellant's photographs was set up under the name of Garrett who was to correspond with appellant relative to the pictures. On December 5th, Detective Smith returned to appellant's home, and appellant showed him some "series" pictures of the same girl in sequence of undressing. At that time appellant stated he was mailing the pictures to a man by the name of Garrett with whom he had had correspondence. On December 13th, Detective Smith again met apellant in the drug store, and appellant informed him that he was sending some more pictures to Garrett.

The State's proof further shows that on January 22nd Detective Smith again saw appellant in the drug store and

introduced him to Postal Inspector Harry D. Holmes. After they had discussed going for some coffee, the three went outside to where Postal Inspector Robinson and Detective Burleson were seated in an automobile. They got in the car, and the five preceeded to drive to the police station. On the way to the station, Robinson and Holmes identified themselves as postal inspectors and told appellant they wanted to talk to him about the pictures. After arriving at the police station, appellant proceeded to sign and execute a written consent to the search of his home by Inspector Holmes without a search warrant. Appellant then accompanied Inspectors Robinson and Holmes and Officers Smith, Burleson and Robins to his home where a search was made. In the search, the officers found sixteen polaroid pictures on a bed and numerous other pictures in a night stand which were photographs of men and women in the nude. Some of the pictures showed the parties engaged in the act of sexual intercourse and other unnatural sex acts.

Testifying in his own behalf, appellant stated that the reason he consented to the search of his home was because of threats of the Officers and the representations made to him that they had a search warrant. He further swore that he did not sign the written consent for the search until after the search had been completed, and they had returned to the police station. Appellant admitted possessing the photographs found by the officers in his home but stated that he took the pictures upon the encouragement and inducement of Detective Smith and a letter he had received from Garrett.

Appellant's testimony with reference to his reason for executing the written consent to search was sharply disputed by the officers as well as his claim that he was induced to take the pictures by them. Detective Smith testified that while he did have in his possession a search warrant for appellant's house he did not advise appellant of the warrant until after he had signed the written consent to search. He swore that appellant signed the consent before the search was made. He also denied having induced appellant to take and possess the photograph found as a result of the search.

The court submitted to the jury in his charge the disputed issues relative to appellant's execution of the written waiver and consent, and instructed the jury that if they believed from the evidence or if they had a reasonable doubt thereof, that appellant did not wilfully give his consent to the search prior to the time of the search, or if he signed the waiver to search as a result of threats or after he was told by the officers that they had a search warrant, to wholly disregard the pictures in question and acquit him. The defense of entrapment was also submitted under appropriate instructions.

The jury by their verdict resolved the disputed issues against the appellant.

We first overrule appellant's contention that the evidence is insufficient to support the conviction because no proof was offered by the State that the pictures introduced in evidence were obscene, which term is defined in Sec. 3 of Art. 527, supra, as whether to the average person applying community standards involving a territory or geographic area

not less than the State of Texas the material taken as a whole appeals to prurient interest. When testimony was offered by the State as to what the pictures portrayed appellant objected on the ground that the pictures "spoke" for themselves. The trial court agreed with such contention and sustained appellant's objection. The pictures introduced in evidence showing men and women in the nude engaged in acts of sexual intercourse are clearly obscene as that term is defined in the statute.

It is insisted that the court erred in admitting the pictures in evidence because they were obtained as the result of an illegal search. The attack upon the search is predicated upon the contention that the search warrant which the officers had obtained was invalid under the decision in Aguilar v. Texas, 12 L. Ed. 2d 723, 84 S. Ct. 1509. It is also contended that appellant's arrest by the officers was unlawful, and for this reason the search was illegal.

We need not pass upon the validity of the search warrant as the evidence shows that the officers did not search appellant's home under the authority of such warrant. Nor need we pass upon the validity of appellant's arrest as we do not have before us the search of a person incident to an arrest. The fact issues as to the validity of appellant's written consent to search his house were fairly submitted to the jury by the court. By their verdict the jury found that appellant voluntarily consented to the search. By such consent appellant waived any question as to the legality of the search. Ellithorpe v. State, 320 S.W. 2d 350; Lucas v. State, 368 S.W. 2d 605.

We find no error in the trial court's failure to make an independent finding upon the issue as to whether appellant voluntarily executed the written consent to the search. Jackson v. Denno, 84 S. Ct. 1774, relates to written confessions of an accused and is not here applicable.

Complaint is made to the court's action in permitting the State to prove the identity of the persons in the pictures which, among oher things, revealed that one of the women in the photographs was the appellant's wife engaged in an act of sexual intercourse with a man by the name of James Stockwell. Objection was also made to certain jury argument of State's counsel when he stated that appellant had prostituted his own wife. Appellant's objection to the testimony showing the identity of the persons in the pictures was on the ground that it was highly inflammatory and constituted proof of extraneous offenses. In his Brief, he also insists that such testimony was in violation of Art. 714, V.A.C.C.P., which prohibits the wife from giving testimony against her husband. The identity of the persons in the pictures was clearly a part of the res gestae and admissible as such. Fite v. State, 290 S.W. 2d 897; Kerrigan v. State, 321 S.W. 2d 884; Bells v. State, 327 S.W. 2d 751. Proof of the identity of appellant's wife and Stockwell in the pictures was also admissible to rebut appellant's defense of entrapment in view of Stockwell's testimony that he had not seen appellant and his wife since the summer of 1962, and it was not until November, 1963, that Detective Smith first talked to appellant and began the investigation. Watson v. State, 301 S.W. 2d 651; Ivey v. State, 212 S.W. 2d 146.

Appellant's remaining complaints are to certain comments by the trial court which he insists were in violation of Art. 707, V.A.C.C.P.

The first comment occurred when appellant objected to the admission in evidence of certain photographs on the ground that the affidavit for the search warrant was void and the court stated: "We are not operating on that Mr. Benavides. I think I have made that pretty clear," and during the cross-examination of appellant's wife by State's counsel with reference to the objects taken from the home when an objection was made by appellant's counsel, the court stated: "You opened it up on the hundred objects taken."

To offend against the statute, Art. 707, supra, there must be found in the court's remarks a benefit to the State or an injury to the accused. Hackett v. State, 357 S.W. 2d 391. We find neither benefit nor injury in the court's comments and overrule the contention.

The judgment is affirmed.

Dice, Judge

(Delivered March 10, 1965)

Opinion approved by the Court.

## CERTIFICATE OF SERVICE

I, EMMETT COLVIN, JR., one of the attorneys for Ben Herbert Phelper, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the .....th day of July, 1966, I served copies of the foregoing Petition for Certiorari on the several parties representing Respondent, the State of Texas, as follows:

Honorable Waggoner Carr, Attorney General for the State of Texas, Supreme Court Building, Austin, Texas;

Honorable Charles Swanner, Assistant Attorney General, State of Texas, Supreme Court Building, Austin, Texas; and

Honorable John Allison, Assistant District Attorney, Dallas County, Records Building, Dallas, Texas.

by mailing a copy in a duly addressed envelope, postage prepaid, to the above parties at the address so indicated.

.....

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END